IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE JURISDICTION
CRIMINAL APPEAL NO.714 OF 1996

1) Jotiba Malappa Tarwal)
Age: 30 years, Occupation)
Agriculture.)
)
2) Munnya alias Kenchappa)
Mallappa Tarwal -)
Age 35 years, Occupation :)
Service.)
)
3) Yallappa Malappa Tarwal)
Age 20 years, Occupation :)
Agriculture.)
)
All residents of Turkewadi)
Taluka Chandgad, District:)
Kolhapur.)...Appellants.

V/s

1) The State of Maharashtra)
)
2) Tulsabai Gangaram Naik)
Resident of Turkewadi, Tal:)
Chandgad, Dist: Kolhapur)...Respondents.

Mr. S.A. Ingawale for the appellants.

Mr. B.H. Mehta, APP for the State.

CORAM : V.G.PALSHIKAR & R.C.CHAVAN, JJ

DATED : 25TH JULY 2005

ORAL JUDGMENT : (Per R.C.Chavan, J)

1. This appeal by three appellants convicted by the Additional Sessions Judge, Gadhinglaj, District Kolhapur, seeks to challenge their conviction for the offence punishable under section 302 read with section 34 of the of the Indian Penal code and the resultant

sentence of imprisonment for life and fine of Rs 10,000/- each inflicted upon them.

2. A petty quarrel arising out of possibly a drunken brawl led to death of Gangaram Laxman Naik at village Turkewadi, Tal. Chandgad, District Kolhapur on 23/10/1994 at about 7.00 p.m. On that day, accused No.2 - Kenchappa came from his house and was abusing, possibly, deceased Gangaram. Gangaram asked the accused to go home and sleep, whereupon the accused Kenchappa said that he would come with his brothers and returned with accused Nos. 1 and 3, all armed with sticks. They abused Gangaram and accused No.1 Jotiba hit on his head with stick. Accused Nos. 2 and 3 also gave stick blows. Gangaram fell on ground with bleeding injury to his head. His sister-in-law Parvati raised cries attracting their kinsmen. Gangaram was lifted and brought to the house. A local doctor was called who advised that Gangaram be taken to Belgaum. While preparation to take Gangaram to Belgaum was going on, he expired. Hence, Gangaram's sister-in-law Parvati gave report at Exhibit-19 at Police Station Chandgad. An offence was registered and investigation commenced. In course of investigation, police recorded statement of witnesses, caused post-mortem examination to be conducted on the dead body of Gangaram after inquest, seized the

incriminating articles and, on completion of investigation, chargesheeted the three accused.

3. The learned Judicial Magistrate, First Class, Chandgad committed the case to the Court of Sessions at Gadhinglaj, District Kolhapur. The learned Additional Sessions Judge framed charge of the offence punishable under section 302 read with section 34 of the Penal Code against all the accused. They pleaded not guilty and hence were put to trial.

4. In course of investigation, prosecution examined in all 8 witnesses. After considering the prosecution evidence, in light of defence taken in statements under section 313 Cr.P.C., the learned Additional Sessions Judge convicted the three appellants and sentenced them as mentioned above. Aggrieved thereby, they have appealed.

5. We have heard both, the learned counsel appearing for the appellants and the learned Additional Public Prosecutor for the State and, with the help of both the learned Counsel, have gone through the entire evidence on record.

6. Complainant P.W. 2 - Parvati is also an eye witness to the incident. She stated about abusing by

the accused No.2, followed by return of all the accused armed with sticks and assault to the victim. Cross-examination of this witness gives a detailed picture about location of various houses, habits of people living in the neighbourhood and the relative financial condition of the persons involved. The only point that could be deduced from the lengthy cross-examination is that though there were male members in the family, the responsibility of giving report to the police fell on Parvati.

7. P.W. 3 - Tukaram Naik is Gangaram's brother. He too witnessed the incident and corroborated P.W. 2 - Parvati in respect of the manner in which the incident took place, except possibly about the exact abusive words. This witness (P.W. 3 - Tukaram) admitted that when Gangaram was assaulted, he did not talk to the accused. He claimed to have gone and brought doctor in about half an hour. There are some small contradictions in his deposition but, essentially, his story compares well with that of P.W. 2 - Parvati.

8. Evidence of P.W. 4 - Balu Naik is not material because he came after the incident. The account of P.W. 2 - Parvati and P.W.3 - Tukaram does not suffer from any infirmity. The defence has not come up with any theory as to how Gangaram sustained injuries. The

suggestion to P.W.2 - Parvati and P.W. 3 - Tukaram that they were falsely involving the accused because their financial position was sound really makes no sense. Therefore, the eye witness account of P.W.2 and P.W.3 is enough to hold that the appellants were authors of the blows which victim Gangaram received.

9. Prosecution examined Tukaram Hajgolkar as P.W.1. P.W. 1 - Hajgolkar has not only proved the inquest panchnama at Exhibit 13 but also panchnama of spot at Exhibit-17. He stated that two sticks were found on the spot and identified those sticks as articles 1 and 2 before the Court.

10. P.W. 5 - Mahadev Naik states that in his presence on 1/11/1994, the accused Kenchappa was interrogated by the police and agreed to produce a stick which was used by him in commission of the offence. A memorandum was accordingly recorded vide Exhibit-26 and stick article No.9 was seized from the hut after the accused took it out. Since this memorandum and the seizure vide Exhibit 27 do not bear signatures of the accused No.2, they may not be taken as impeccable evidence of discovery at the instance of accused No.2 - Kenchappa. Hence, this part of the evidence relating to seizure of article 9 at the instance of accused No.2 may be excluded from

consideration for arriving at the conclusions about guilt of the accused.

11. P.W. 6 - Police Constable Shankarrao Chavan stated that he carried the seized property to the Forensic Science Laboratory. The reports in respect of this property are at Exhibits 30 and 31. While the blood group of Jotiba and Kenchappa had been ascertained as "B" and "O" respectively, the blood group of Yallappa could not be ascertained. The report at Exhibit-31 would show that victim's clothes were also stained with blood group "O". The bambu sticks seized at the spot had blood of group "O". The stick seized at the instance of accused - Kenchappa had human blood but the group could not be ascertained. Therefore, seizure of all these articles and the result of their examination in laboratory in itself, would not help in connecting the accused to the crime.

12. However, as observed in the preceding paragraphs, the evidence of eye witnesses itself is enough to indicate that the accused persons had given blows by sticks on victim Gangaram. The notes of post-mortem examination at Exhibit-22 would show that there was only one surface wound viz. C.L.W. right parietal region anterior 1/2 Transverse 3 x 1/2 cm. bone deep.

Upon dissection, it was found that this injury had led to four fractures on frontal and parietal bones, resulting in Haematoma on frontal parietal region under scalp. The cause of death was Cardiorespiratory failure due to brain damage.

13. Prosecution has not examined the Medical Officer. However, from the notes at Exhibit-22, it is clear that this one injury on the head of the victim had led to his death. It may be recalled that the prosecution witnesses state that all the accused were armed with sticks only. They do not say that any other weapon was used. The injury observed in column No.7 of the post-mortem notes Exhibit-22 also is one which could have been ordinarily caused by stick only. It is true that though story of assault by three accused persons with sticks is given, no other injuries were found on the victim. But this need not result in disbelief in the account of incident given by P.W.2 - Parvati and P.W. 3 - Tukaram, though the learned counsel for the appellant so contended, because it is possible that blows may not have resulted in any visible injuries. In a small incident, when the victim fell with bleeding injury, the accused would naturally flee, unless they harboured an intention to finally finish the victim. The presence of only one injury caused by stick alone would, according to the appellants'

learned Counsel, make it necessary to examine whether the requisite intention or knowledge could be attributed to the authors of the injury to convict them under section 302 of the Indian Penal Code.

14. The learned Additional Public Prosecutor submitted that since the victim met with his death on account of injury authored by accused persons, it must be inferred that this injury, in itself, was, in the ordinary course of nature, sufficient to cause the death and that the accused had the requisite knowledge, if not the intention that the blows which they were administering would lead to victim's death. He submitted that there could be no question of reducing the conviction of the appellants from one under section 302 of the Indian Penal Code to section 304(II) of the Indian Penal Code because section 304 would be attracted only if the case fell in one of the exceptions enumerated in section 300 of the Penal Code. He submitted that, in the instant case, there was absolutely no provocation whatsoever from the victim to justify any attack by the accused persons.

15. We have carefully considered these rival contentions. We are afraid that if the contention of the learned Additional Public Prosecutor is accepted every homicide, unless it was shown to fall in one of

the exceptions under section 300 of the Penal Code, would have to be dealt with under section 302 of the Penal Code only, which is something not contemplated by the scheme of sections 299 and 300 of the Penal Code.

16. There have been many occasions for the Supreme Court to consider the exact scope of and distinction between the provisions of section 299 and 300 of the Indian Penal Code. True it is that section 300 begins with the words "Except in the cases hereinafter excepted, culpable homicide is murder". This may give an impression that if the case did not fall under one of the exceptions under section 300, culpable homicide would be murder. This impression is however erased by the further part of the same sentence of section 300, viz. "if the act by which the death is caused is done.....". The section then enumerates four ingredients which are then followed by illustrations and exceptions with illustrations for each exception. These four ingredients which read as under spcify the special degree of mens rea required to attract provisions of section 300.

> "300. **Murder.**- Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or -

> Secondly.- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or
>
> Thirdly.- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or
>
> Fourthly.- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

17. Culpable homicide would not amount to murder where degree of mens rea specified under section 299 is present but not the special degree prescribed by the above four clauses in section 300. In case, a person commits an act by which death is caused with the intention of causing death, there would be no doubt that such act would amount to murder, unless the case fell in one of the exceptions of section 300.

18. The distinction in the language of sections 299, 300 would become germane only in cases where the intention is not of causing death, but of causing such bodily injury which may cause death, or where intention cannot be discerned,but knowledge that the act is likely to cause death can be attributed. In these two areas, the requirements of section 299 and

300 differ. In the first area, where intention is discernible, while section 299 merely requires the act to have been done with the intention of causing such injury as is likely to cause death,to attract section 300 it is necessary to show that the act is done with the intention of causing such bodily injury as the offender knows to be likely to cause death, i.e. mere likelihood of causing death is not enough but such likelihood must be within the knowledge of the offender. Alternatively, the act must be such that the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. Thus, in these two possibilities either the offender has knowledge of the consequences of the intented injury or such knowledge can be imputed to him, given the ordinary course of nature.

19. In respect of the second area of knowledge, comparison of expression used in sections 299 and 300 distinctly brings out the additional requirements to attract section 300. Section 299 merely requires that the act should have been done with the knowledge that the offender is likely, by such act, to cause death. Whereas, to attract section 300 a person must know that the act is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death.

20. The clause "Fourthly" in section 300 has one more additional requirement viz. that the person commiting such act without any excuse for incurring the risk of causing death or such injury etc. must know that the act is so imminently dangerous that it must in all probabilities cause death.

21. The words chosen by the draftsmen of these two sections are so accurate and succinct that explaining them, or elaborating the requirements by using any other expression has the potential danger of diluting or confounding requirements of these two sections. Hence, instead of our attempting to comment upon the requirements spelt out in the two sections, we would prefer to rely on the masterly exposition of the two provisions by the Supreme Court in Virsa Singh Vs. The State of Punjab reported in AIR 1958 SC 465. The Court observed as under:-

> "(12) To put it shortly, the prosecution must prove the following facts before it can bring a case under S. 300 "thirdly":
>
> . First, it must establish, quite objectively, that a bodily injury is present;
>
> . Seconldy, the nature of the injury must be proved; These are purely objective investigations.
>
> . Thirdly, it must be proved that there was an intention to inflict that particular bodily

injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

. Once these three elements are proved to be present, the enquiry proceeds further and,

. Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

22. In the case of State of Andhra Pradesh Vs. Rayavarapu Punnayya and another reported in **(1976) 4 SCC 382**, the Supreme Court has observed in its judgment in paragraphs 12, 13, 21 and 22 as under:-

"12. In the scheme of the Penal Code, 'culpable homicide' is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder', is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The *first* is, what may be called 'culpable homicide of the first degree'. This is the greatest form of culpable homicide, which is defined in Section 300 as 'murder'. The *second* may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

13. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these

sections, allow themselves to be drawn into minutae abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	*Subject to certain exceptions* culpable homicide is murder if the act by which the death is caused is done-
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is *likely* to cause death; or	(2) with the intention of causing such bodily injury as the *offender knows to be likely* to cause the death *of the person to whom* the harm is caused; or
	(3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflic--ted is *sufficient in the ordinary course of nature* to cause death; or
KNOWLEDGE	
(c) with the knowledge that the act is *likely* to cause death	(4) with the knowledge that the act is so *imminently dangerous that it must in all probability cause death* or such bodily injury as is likely to cause death, and without any excuse for

incurring the risk of causing death or such injury as is mentioned above.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is ‘murder’ or ‘culpable homicide not amounting to murder’, on the facts of a case, it will be convenient for it to approach the problem in three stages. The questions to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of ‘murder’ contained in Section 300. If the answer to this question is in the negative the offence would be ‘culpable homicide not amounting to murder’, punishable under the *first* or the *second* part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be ‘culpable homicide not amounting to murder’, punishable under the first part of Section 304, Penal Code.

22. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so interwined and the second that the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages."

. These observations have been practically reproduced by the Supreme Court in number of subsequent decisions. The question of invoking exceptions, like sudden and grave

provocation would arise only after these requirements are fulfilled.

23. Applying the tests laid down by the Apex Court, it is clear to us that one blow by a stick could, by no stretch of imagination, be enough to attribute requisite knowledge to the assailants, who were acting in furtherance of their common intention, that such blow would lead to death of victim. Therefore, the case falls squarely into category of lowest degree of homicide for which punishment is prescribed under section 304 Part-II of the Penal Code.

24. We, therefore, allow the appeal partly, set aside the conviction and sentence of the appellants under section 302 read with section 34 of the Indian Penal Code and, instead, convict them for the offence punishable under section 304 Part-II read with section 34 of the Indian Penal Code. Considering the context in which the incident occurred, the fact that only one blow by a stick was given and also the fact that more than 10 years have elapsed since the incident occurred, we feel that interest of justice would be served if the appellants suffer rigorous imprisonment for five years each. We, therefore, sentence the appellants to suffer rigorous imprisonment for five years each and direct them to surrender to their bail before the

learned Additional Sessions Judge within a month of this order to suffer their sentences.

(V.G. PALSHIKAR, J.)

(R.C. CHAVAN, J.)